

1 2.4 Class Definition

2 A. In granting Plaintiffs' motion for class treatment pursuant to Fed. R.
3 Civ. P. 23 on February 6, 2009, the Court certified class claims "arising out of donning
4 and related waiting time from the time that equipment is made available for donning."
5 (dkt. no. 694). The Court also certified California class claims arising out of "[(1)]
6 unpaid travel time on company provided travel for the first hour of travel to and the first
7 hour of travel from an inventory site, and [(2)] the alleged failure to comply with the
8 requirements of California Labor Code section 226 that employers must provide
9 properly itemized wage statements."

10 B. Solely for purposes of settlement, on or before July 9, 2010,
11 Plaintiffs will move the Court for an order modifying the claims certified for class
12 treatment to specifically include the California, Oregon, Illinois, and Washington state
13 meal period and rest break claims raised in the operative complaint in the instant action.
14 Defendant will not oppose Plaintiffs' motion. The parties agree, however, that should
15 the settlement fail to become final, for whatever reason, that the certification of these
16 meal period and rest break claims will become null and void *ab initio*. In addition, such
17 class certification will have no effect on Plaintiffs' collective/class claims outside of the
18 settlement context and in no event will this Agreement be admissible as evidence of the
19 appropriateness of class certification of these claims outside the settlement context.
20 Defendant expressly reserves its right and hereby declares its intention to oppose the
21 continuing maintenance of the instant action as a class or collective action should this
22 settlement not become final.

23 C. The parties further agree that obtaining an order amending the claims
24 certified for class certification as provided in section 2.4.B. is a material term of this
25 Agreement.
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Defendant denies that it has failed to comply with the law in any respect, or has any liability under the claims asserted in the instant action. The parties acknowledge that this Agreement is entered into for the purpose of compromising highly disputed claims and that nothing herein is an admission of liability, wrongdoing, or the propriety of class treatment by Defendant. Neither the Agreement nor any document prepared in connection with the settlement may be admitted in any proceeding as an admission by Defendant. Notwithstanding this paragraph, any and all provisions of this Agreement may be admitted in evidence and used in any proceeding to enforce the terms of this Agreement or in defense of any claims released or barred by this Agreement.

A. Payment of the Settlement Amount is the sole financial obligation of Defendant under this Agreement, except that, in addition to the Settlement Amount, Defendant will pay its share of employer payroll taxes on the applicable portions of the Settlement Payments.

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2.7 Method Of Determining Amount Of Settlement Payments

Plaintiffs will determine the Settlement Payments. To the extent that Authorized Claimants cannot be located, opt out, or elect not to accept payment of their designated share of the Settlement Amount, their share will be redistributed on a pro rata basis to the remaining Authorized Claimants.

2.8 Allocation Of Settlement Payments

Each Authorized Claimant will be responsible for remitting to taxing authorities any applicable taxes which may be owed on the portion of any payment received pursuant to this Agreement. Plaintiffs' Attorneys will determine the manner in which Settlement Payments will be apportioned among Settlement Class Members and Plaintiffs' Attorneys will inform Defendant of these amounts in sufficient time to allow Defendant to prepare checks, which will be provided to the Claims Administrator for delivery to Settlement Class Members. Notwithstanding the above, only 50 percent of the total Settlement Payments made to Settlement Class Members will consist of back wages. The parties agree that \$100,000 from the Settlement Amount will be allocated as penalties under the California Private Attorney General Act and that this amount will be paid to the State of California.

2.9 Release Of Claims By Named Plaintiffs And Settlement Class Members

A. For and in consideration of the mutual promises contained herein, Plaintiffs and the Settlement Class Members fully and finally release Defendant from any and all liability for all claims that were asserted, or that could have been asserted, in the instant action. This includes any and all claims, actions or causes of action, demands, obligations, guarantees, expenses, attorney's fees, damages, or costs, alleged in or based upon the First Amended Consolidated Complaint herein (dkt. no. 88) from the maximum applicable limitations period for each claim through the date that the Court enters a final order granting final approval of the settlement, including, but not limited to: (1) the alleged failure to pay straight time wages for all off-the-clock work

1 and all on-the-clock work under any state, local, or federal law; (2) the alleged failure to
 2 pay the required minimum wage for all off-the-clock work and all on-the-clock work
 3 under any state, local, or federal law; (3) the alleged failure to pay overtime
 4 compensation for all off-the-clock work and all on-the-clock work under any state,
 5 local, or federal law; (4) the alleged failure to provide proper and adequate meal periods
 6 and rest breaks under any state, local or federal law; (5) the alleged failure to provide all
 7 wages, rest breaks, and meal periods required as a matter of contract; (6) the alleged
 8 breach of covenant of good faith and fair dealing by failing to provide all rest breaks
 9 and meal periods required as a matter of contract; (7) the alleged failure to pay all wages
 10 due upon termination under any state, local, or federal law; (8) the alleged failure to pay
 11 penalties under California Labor Code sections 203 and 2698 *et seq.* (Private Attorney
 12 General Act) and Oregon Revised Statutes section 652.150; (9) the alleged failure to
 13 issue proper itemized wage statements under California Labor Code section 226;
 14 (10) all claims for restitution and/or other relief under California Business and
 15 Professions Code section 17200 *et seq.* as a result of or based upon the foregoing
 16 alleged legal violations; (11) all claims for injunctive relief based upon the foregoing
 17 alleged legal violations; (12) all claims for liquidated damages based upon the foregoing
 18 alleged legal violations; (13) the alleged failure to pay pre-judgment interest on any
 19 unpaid wages, liquidated damages, penalties, or any other damages based on the
 20 foregoing alleged violations; (14) litigation costs and attorney's fees in connection with
 21 the instant action; and (15) any other claims of any kind alleged in the instant action.

22 B. This waiver and release of claims encompasses both known and
 23 unknown claims as described above in section 2.9.A. of this Agreement. Specifically,
 24 Settlement Class Members are deemed to waive the provisions of section 1542 of the
 25 California Civil Code, which provides as follows:

26 **A general release does not extend to claims, which the**
 27 **creditor does not know or suspect to exist in his or her**

1 favor at the time of executing the release, which if known
 2 by him or her must have materially affected his or her
 3 settlement with the debtor.

4 Thus, if the facts relating to this settlement are found hereafter to be different from the
 5 facts now believed to be true, the release of claims set forth herein will remain fully
 6 effective.

7 2.10 Opt-Outs

8 Members of the Settlement Classes may choose to opt out of the settlement under
 9 the procedures specified herein. Persons who opt out of the settlement ("opt-outs") will
 10 receive no part of the Settlement Amount and will not be bound by the terms of the
 11 Agreement. No party will solicit, encourage, or discourage opt-outs. Any attempt to do
 12 so by Plaintiffs or Defendant will be deemed a breach of the Agreement. If such breach
 13 occurs, the Court has the authority, upon proper motion, to void any opt-out who was
 14 improperly solicited or encouraged. The parties will receive a copy of all valid requests
 15 for exclusion from the Claims Administrator within 10 calendar days of the final date to
 16 opt out. If more than 150 persons elect to opt out as specified herein, then Defendant
 17 will have the option to declare this settlement null and void, if, within 10 business days
 18 following the receipt of all valid requests for exclusion from the Claims Administrator,
 19 Defendant serves written notice of its intention to exercise this option on Plaintiffs'
 20 Attorneys.

21 2.11 Preliminary Approval Of Settlement

22 The parties agree to the following procedures for (i) preliminary approval of this
 23 settlement, (ii) certifying additional class claims for purposes of settlement only, (iii)
 24 notifying class members of the settlement, and (iv) obtaining final Court approval of the
 25 settlement.

26 A. Class certification for settlement purposes only. For purposes of
 27 settlement only, the parties stipulate as to the appropriateness of the class claims defined

1 in section 2.4. and acknowledge that this definition of the class claims is a material term
2 of this Agreement. If the Court denies the Plaintiffs' motion to modify class claims or
3 denies either preliminary or final approval of this Agreement, or if Defendant elects to
4 exercise its option to declare the Agreement void as provided in section 2.10. above, the
5 Agreement will be void and will have no further force or effect. The parties' agreement
6 as to class certification of meal period and rest break claims in section 2.4.B. above will
7 also have no further force or effect.

8 B. Motion for Preliminary Approval. As soon as practicable, and no
9 later than July 9, 2010, the parties will file a Motion for Preliminary Approval of the
10 Agreement.

11 C. Notice of Settlement. The Notice of Settlement, substantially in the
12 form attached hereto as exhibit 1, will be mailed to all members of the Settlement
13 Classes by the Claims Administrator after entry of the Order Granting Preliminary
14 Approval of the Agreement.

15 D. Within 30 calendar days after the date the Court enters an Order
16 Granting Preliminary Approval of this Agreement, Defendant will provide the Claims
17 Administrator with the names, last known mailing address, and Social Security number
18 for all members of the Settlement Classes from Defendant's records. This information
19 will remain confidential and will not be disclosed to anyone other than the Claims
20 Administrator, with the exception of applicable taxing authorities or pursuant to express
21 written authorization by Defendant or by order of the Court. Within the time frame
22 referenced in this paragraph, Defendant also will provide Plaintiffs' Attorneys with a
23 separate list of the names, states of residence, and employee identification numbers of
24 all members of the Settlement Classes. This list will remain confidential and will not be
25 distributed by Plaintiffs' Attorneys. The list will be used by Plaintiffs' Attorneys solely
26 for purposes of administering the settlement. Plaintiffs' Attorneys will return the list
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1 and any copies to Defendant within 10 calendar days after the final settlement payment
2 is made.

3 E. Before any Notice of Settlement is mailed, addresses may, in the
4 discretion of the Claims Administrator, be updated through the national change of
5 address database, skip traces, or any other method that Plaintiffs' Attorneys or the
6 Claims Administrator deems appropriate. Any fees or costs incurred by the Claims
7 Administrator in updating addresses are Settlement Expenses and are included in the
8 Settlement Amount. Plaintiffs' Attorneys may also provide the Claims Administrator
9 with e-mail addresses for Settlement Class Members that they have in their possession,
10 for purposes of allowing the Claims Administrator to provide notice to such Settlement
11 Class Members via e-mail in addition to the procedures for notice by first-class mail set
12 forth below. Such notice by e-mail is supplemental and shall not otherwise affect the
13 notice by mail procedures set forth herein. Any fees or costs incurred by the Claims
14 Administrator in providing e-mail notice are Settlement Expenses and are included in
15 the Settlement Amount.

16 F. Within 45 calendar days after the Court enters an Order Granting
17 Preliminary Approval of the Agreement, the Claims Administrator will mail the Notice
18 of Settlement to all identified members of the Settlement Classes by first-class mail
19 using the last known mailing address from Defendant's records or from a national
20 change of address search. The deadline for returning written requests for exclusion
21 from the settlement will be 30 calendar days from the date the mailing is postmarked.

22 G. If Notice of Settlement forms are returned because of incorrect
23 addresses, the Claims Administrator will conduct a Social Security number search for
24 more current addresses and re-mail the notice to any new addresses obtained within 15
25 days of receipt of the new address. If a new address is obtained by return mail, the
26 Claims Administrator will mail within 15 days of receipt, a second Notice of Settlement
27 to the addressee by first-class mail and notify counsel for the parties of the date of each
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1 re-mailing. Members of the Settlement Classes whose original notices of settlement are
2 re-mailed pursuant to this paragraph will have their objection deadline extended by the
3 number of days between original mailing date of the Notice of Settlement and the date
4 on which the Notice of Settlement was re-mailed. The Claims Administrator and
5 Plaintiffs' Attorneys are authorized to take whatever reasonable steps deemed necessary
6 to locate any settlement class member. For purposes of section 2.11.E. above, the 30-
7 calendar-day period will be extended to account for all re-mailed notices of settlement.
8 The Claims Administrator will conduct only one re-mailing.

9 H. The Notice of Settlement will inform the Settlement Classes of their
10 right to object to the settlement and that to do so they must file with the Court and serve
11 on counsel for the parties either a written statement objecting to the settlement or a
12 written notice of their intention to appear and object at the Final Settlement Hearing.
13 Such written statement or notice must be filed and served within 30 calendar days after
14 the mailing date of either the original Notice of Settlement or the re-mailed Notice of
15 Settlement. Persons who are included in the Settlement Classes who fail to timely file
16 and serve written objections or notice of intention to appear and object in the manner
17 specified above will be deemed to have waived any objections and will be foreclosed
18 from making any objection to the settlement, whether by appeal or otherwise.

19 I. The Notice of Settlement will explain the option for members of the
20 Settlement Classes to opt out of the settlement. Any person wishing to opt out of the
21 settlement must comply with the deadline and procedures specified in the Notice of
22 Settlement for doing so. Persons who fail to file and serve a valid and timely written
23 request for exclusion on or before the filing deadline, will be bound by all terms of the
24 Agreement and the final order approving the settlement, regardless of whether they have
25 objected to the settlement. Within 10 calendar days after the deadline for filing written
26 requests for exclusion, the Claims Administrator will provide the parties with a list of all
27 persons who have validly and timely requested exclusion from the settlement.

1 J. Non-solicitation of opt-outs/objections. The parties agree that they
2 will not solicit or encourage directly or indirectly members of the Settlement Classes to
3 request exclusion from the settlement, object to the settlement, or appeal the final order
4 approving settlement.

5 K. Final settlement. A Final Settlement Hearing will be set by the
6 Court. No later than 20 calendar days before the Final Settlement Hearing, the Claims
7 Administrator will provide Class Counsel with a declaration stating that it has complied
8 fully with all of its obligations under the Agreement, which Class Counsel will file with
9 the Court. No later than 16 calendar days before the Final Settlement Hearing, the
10 parties will file a motion for final approval. The parties will prepare a proposed final
11 order approving the settlement. The proposed final order will, among other things: (i)
12 grant final approval to the Agreement as fair, reasonable, adequate, in good faith, and in
13 the best interests of the Settlement Classes as a whole, and order the parties to carry out
14 the provisions of this Agreement; (ii) adjudge that the Settlement Class Members are
15 conclusively deemed to have released Defendant from all rights, claims, demands,
16 liabilities, causes of action, liens, and judgments that arise out of or are related to the
17 instant action, as more specifically set forth above; (iii) prohibit and permanently enjoin
18 each Settlement Class Member from pursuing in any fashion against Defendant any and
19 all of the released claims; and (iv) reserve for the Court continuing jurisdiction over the
20 instant action solely for purposes of enforcing this Agreement and addressing such post-
21 final order matters as may be appropriate.

22 L. Defendant will be responsible for providing the notices required by
23 28 U.S.C. § 1715(b). However, the Claims Administrator will be responsible for
24 preparing and filing the notices. The cost of preparing and filing such notices will be
25 deducted from the Settlement Amount.

2.12 Funding Of Settlement Amount

A. Payment of Authorized Claims. Defendant will pay the Settlement Amount to the Claims Administrator 10 calendar days after the Effective Date. Within 15 calendar days after such payment is received by the Claims Administrator, payments will be made by the Claims Administrator to each Authorized Claimant. Those persons who properly opt out of the settlement are not entitled to any Settlement Payments. The approval and denial of payments by the Claims Administrator will be conclusive and binding on all Settlement Class Members, subject to the dispute resolution provisions of this Agreement as set forth in section 2.13.

B. Application for approval of attorney's fees and expenses. Plaintiffs will submit an application to the Court for approval of attorney's fees and litigation expenses. Plaintiffs will request that the Court approve an award of \$11,380,000 as attorney's fees and approximately \$2,200,000 as litigation expenses, which does not include the cost of the Claims Administrator. Defendant will not oppose the amounts sought by Plaintiffs for attorney's fees and litigation expenses. Plaintiffs' Attorney's Fees will not exceed the amount of their calculated lodestar. Plaintiffs' Attorney's Fees and Litigation Expenses will be paid solely from the Settlement Amount. In no event will Defendant be required to pay more than the Settlement Amount in full satisfaction of all its obligations under this Agreement, with the single exception that, as provided herein, Defendant will pay its share of employer payroll taxes associated with payments of back pay to Authorized Claimants pursuant to this Agreement.

C. Payment of attorney's fees and expenses. Plaintiffs' Attorney's Fees and Litigation Expenses will be paid by the Claims Administrator within 10 calendar days after receipt of the Settlement Amount. Defendant will issue a form 1099 to each Class Counsel for the payments and each Class Counsel will provide Defendant with completed W-9 forms.